STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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SAFECO INSURANCE COMPANY OF AMERICA, Subrogee of MARK TAYLOR and MARIA TAYLOR,

Plaintiff,

v

Case No. 99-19270-NZ
HON. PHILIP E. RODGERS, JR.

GEOFURNACE SYSTEMS, INC. and THE CARRIER CORPORATION, Jointly and Severally,

Defendants,

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Attorney for Plaintiff

Peter D. Bosch (P35965)
Attorney for Defendant Geofurnace Systems, Inc.

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Attorneys for Defendant The Carrier Corporation

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DECISION AND ORDER DENYING
DEFENDANT CARRIER CORPORATION'S
MOTION FOR SUMMARY DISPOSITION

Mark and Maria Taylor ("Taylors") were building a cottage on Skegemog Point when it was damaged by fire on December 4, 1997. It is undisputed that the fire originated in a crawl space where there were light fixtures, a live extension cord and a furnace manufactured by The Carrier Corporation ("Carrier").

The Taylors' homeowners' insurance policy was underwritten by Plaintiff Safeco Insurance Company ("Safeco"). Safeco paid the Taylors' fire damage claim and then filed this subrogation/product liability action against "Carrier", the manufacturer of the furnace, and Geofurnace Systems, Inc. ("Geofurnace"), who installed the furnace. Safeco alleged against Carrier:

(1) negligent design of the furnace circuit board; (2) negligent manufacture of the furnace circuit board; (3) breach of implied warranty for design and (4) breach of implied warranty of fitness for a particular purpose.

Carrier filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Carrier claims that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The Court reviewed the Plaintiff's response, Carrier's reply and entertained the parties' oral arguments on November 27, 2000. At that time, Plaintiff agreed to dismiss claims for negligent manufacturing and breach of implied warranty for design. As to the remaining counts, the Court took the matter under advisement. For reasons that will now be described, the motion is denied.

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was recently set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the

> opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Carrier claims that Safeco cannot produce any evidence that Carrier was negligent in designing the furnace circuit board. Carrier further claims that Safeco's only evidence of a defective product is "the testimony of an electrical engineer whose testimony is unreliable and unsupported by any known or accepted engineering principles or methodologies."

In the product liability case of *Lorencz v Ford Motor Co*, 439 Mich 370, 375; 483 NW2d 844 (1992), our Supreme Court said:

> In a cause of action arising from a tortious injury, there are four elements:
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> 1. The existence of a legal duty by defendant toward plaintiff;
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> 2. the breach of such duty;
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> 3. the proximate causal relation between the breach of such duty and an injury to the plaintiff; and
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> 4. the plaintiff must have suffered damages.

Carrier claims that Safeco cannot make out a prima facie case of negligent design because it has no evidence of Carrier's negligence in designing the subject furnace circuit board. Similarly, Carrier claims that Safeco cannot prove its breach of implied warranty claim because of the unreliability of its expert witness.

In *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 604; 552 NW2d 523 (1996), the Court of Appeals stated:

> A plaintiff bringing a products liability action must show that the defendant supplied a product that was defective and that the defect caused the injury. The plaintiff may establish its case by circumstantial and direct evidence. The plaintiff meets its burden when it demonstrates, by a reasonable probability, that the defect is attributable to the manufacturer and that such hypothesis is more probable than any other hypothesis reflected by the evidence. The plaintiff, however, is not obliged to eliminate all [other] possible causes of the accident.

In this case, Safeco's expert witness testified at his deposition that there was a design defect in the furnace circuit board. Specifically he stated:

> It's my opinion that the furnace caused the fire, . . . that the furnace control board was defective in manufacture and design. But most probable cause of the fire was a defective solder joint of the K-1 relay, which led to overheating of the K-1 trace to a temperature where ignition occurred to the board and to the housing. (Anderson Dep at p 39).
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> They've gone to something that can't handle the power as well, what's dissipated in the trace. So the temperatures are going to be higher than they ever have. And they've also gone to a board that's less flame resistant or has less flame retardant. (Anderson Dep at p 55).

In addition, Mr. Anderson filed an affidavit in opposition to Carrier's motion which supplements his deposition testimony. On the basis of this evidence, the Plaintiff has established a prima facie case of a design defect and the breach of an implied warranty of fitness for a particular purpose. Carrier attacks Mr. Anderson's expert witness testimony, however, as "unreliable and unsupported by any known or accepted engineering principles or methodologies." In *Anton v Farm Mutual Automobile Ins Co*, 238 Mich App 673, 678-680; 607 NW2d 123 (2000), the Court of Appeals recently said:

> Absent an abuse of discretion, the qualification of a witness as an expert and the admissibility of his testimony will not be reversed on appeal. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). The trial court may qualify a witness as an expert if it determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857 (1995), amended 450 Mich 1212; 548 NW2d 625 (1995). The facts and data on which an expert relies in formulating an opinion must be reliable. *Amorello v Monsanto Corp*, 186 Mich App 324, 332; 463 NW2d 487 (1990). MRE 702 restricts the subject of an expert's testimony to "recognized scientific . . . knowledge." As explained by this Court in *Nelson v American Sterilizer Co* (On Remand), 223 Mich App 485, 491-492; 566 NW2d 671 (1997):
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> > MRE 702 requires a trial court to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from "recognized scientific knowledge." To be derived from recognized

> scientific knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of scientific methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature. This is not to say, however, that the subject of the scientific testimony must be known to a certainty, *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993). As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel.

> Pursuant to MRE 702, the *Davis-Frye* rule limits the admissibility of novel scientific evidence by requiring the party offering such evidence to demonstrate that it has gained general acceptance in the scientific community. *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995); *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995). In conducting a *Davis-Frye* inquiry, a trial court is not concerned with the ultimate conclusion of an expert, but rather with the method, process, or basis for the expert's conclusion and whether it is generally accepted or recognized. General scientific recognition may not be established without the testimony of impartial experts whose livelihoods are not intimately connected with the evidence at issue. *Id* at 221; 530 NW2d 497. See also *People v Tobey*, 401 Mich 141, 145; 257 NW2d 537 (1977). The party offering the evidence has the burden of demonstrating its acceptance in the scientific community. *People v Davis*, 199 Mich App 502, 512; 503 NW2d 457 (1993); *Kluck v Borland*, 162 Mich App 695, 697; 413 NW2d 90 ( 1987).

Carrier does not claim that the opinion testimony offered by Mr. Anderson is novel, but rather that it is, "unreliable and unsupported by any known or accepted engineering principles or methodologies." Carrier does not, however, support this assertion with any affidavits demonstrating why Mr. Anderson's opinions are flawed. Instead, Carrier refers the Court to Mr. Anderson's deposition and argues the issue of reliability. Carrier essentially asks the Court to weigh the proposed scientific evidence of Plaintiff's expert and dismiss it as unreliable. Of course, the (C)(10) standard of review precludes such a result.

Carrier does not dispute Mr. Anderson's credentials or scientific principles relating to fire, electricity or the design of circuit boards. Rather, Carrier disputes the conclusions Mr. Anderson draws from the known physical evidence, his failure to perform independent tests, propose an

alternative design or conduct a risk utility and hazard analysis. At trial, these issues may prove fatal to Plaintiff's claim. At this time though, Plaintiff relies upon past design flaws in Carrier's own circuit boards and subsequent design changes which Mr. Anderson opines were feasible at the time of the subject fire. Viewed most favorably from Plaintiff's perspective, a prima facie case exists on the two remaining theories.

Since much of Plaintiff's case is predicated on facts and documents produced by Carrier and its witnesses, the Court sees neither judicial economy nor cost effectiveness to the parties in conducting a *Daubert* hearing. A *Daubert* hearing would essentially be a bench trial preceding the potential re-submission of the same evidence to a jury.

It is the Court's opinion that the Defendant Carrier's motion for summary disposition must be denied at this time but without prejudice to resubmit these arguments as a motion for directed verdict at the close of Plaintiff's case. At that time, the Court will have the benefit of the actual trial testimony and will know whether the facts which support Plaintiff's claims are in evidence and can draw its own preliminary evidentiary conclusion as to the reliability of any expert's opinions.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/30/00